NOS._____ and _____ (CONSOLIDATED)

United States of America

Before the
Department of Commerce

WEAVER'S COVE, ENERGY, LLC,

Appellant,

v.

MASSACHUSETTS OFFICE OF COASTAL ZONE MANAGEMENT,

Respondent.

MILL RIVER PIPELINE, LLC,

Appellant,

v.

MASSACHUSETTS OFFICE OF COASTAL ZONE MANAGEMENT,

Respondent.

SUPPLEMENTAL BRIEF FOR RESPONDENT

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INTRODUCTION

Several documents that the Secretary recently accepted into the Decision Record for these consolidated consistency appeals strengthen the arguments made by the Massachusetts Coastal Zone Management Office ("MCZM") as to why the Secretary should not override MCZM's objections. This Supplemental Brief explains how.[1]

The newly-accepted documents fall into three categories: (1) documents related to the United States Coast Guard's Letter of Recommendation ("LOR-related Documents"); (2) rulings issued by the Massachusetts Department of Environmental Protection on December 14, 2007 ("MassDEP Rulings"); and (3) comments of federal agencies and other third parties submitted to the Secretary ("Comments").

The first category, LOR-related Documents, includes three items: The first is the Coast Guard's LOR itself, issued on October 24, 2007, which formally adopts and endorses the recommendation of unsuitability of the waterway for the proposed LNG tanker traffic that the Coast Guard predicted in its earlier Assessment of May 2007. Second Supplemental Appendix ("SSA") 1. The second item is Weaver's Cove's request for reconsideration of the LOR (SSA 40), and the third item is the Coast Guard's letter, dated December 7, 2007, unequivocally upholding and affirming the determinations of the LOR ("Affirmance") (SSA 94).

The second category, MassDEP Rulings, includes five letters issued by MassDEP on December 14, 2007, that represent actions taken on requests for permits, licenses, certifications,

[1] For the sake of efficiency, MCZM refrains from duplicating facts and arguments (including the standard of review) already set forth in its opening brief, and, instead, incorporates by reference its earlier brief, including the terminology defined and used therein. Thus, MCZM's brief and this supplemental brief should be read in tandem. MCZM also notes its concurrence with arguments set forth in the amicus curiae brief of the City of Fall River and urges the Secretary to give it due consideration.

or other approvals (collectively, "Permits") that remained pending before MassDEP as the statutory period for MCZM's consistency review was expiring (thereby preventing MCZM from completing its federal consistency review and compelling procedural objections to avoid a presumption of concurrence (*see* MCZM Br. at 1, 3, 14)). SSA 100-161. Three of the December 14, 2007, rulings identified deficiencies in the records that prevented MassDEP from being able to review properly the pending Permit requests.[2] SSA 147, 153, 158. On the same day, MassDEP conditionally granted a water quality certification (SSA 100) and issued a state c. 91 license with conditions (SSA 108).

The third category, Comments, includes seven comment letters submitted to the Secretary from five federal agencies, two congressmen, and a nongovernmental entity. SSA 162-181. Only one of the federal agencies, the Department of Defense (DOD), addressed Ground II,[3] and it made a negative finding (*i.e.*, that, if the Project does not go forward, there would not be a significant impairment to national defense or other national security interest), as did the two congressmen. *See* SSA 162,[4] 171.[5] Two other agencies, the Department of Energy (DOE) and the Federal Energy Regulatory Commission (FERC), submitted letters that contained no findings

[2] Applicants responded to these three deficiency letters by instructing MassDEP to proceed with its review "based on the record as it now stands," effectively inviting denials. As a result, just a few days ago, on March 10, 2008, MassDEP had no choice but to deny each of these deficient requests. The March 10 denials are final agency actions on, and update the status of, these Permit requests. Therefore, consistent with the Secretary's instructions (*see* NOAA's letter order dated February 22, 2008) they are the subject of MCZM's third motion to supplement the Decision Record, submitted herewith.

[3] The Secretary's solicitation to comment to FERC and the Army Corps of Engineers invited them to address both Grounds I and II; but, his invitation to all other federal agencies solicited comments on Ground II only.

[4] Letter of Peter F. Verga (Assistant Secretary of Defense) to Brett Grosko (NOAA), dated November 19, 2007. SSA 162.

[5] Letter of Barney Frank and James P. McGovern (Congress) to the Honorable Carlos M. Guitierrez (DOC), dated November 9, 2007. SSA 171.

on Ground II; but, rather, offered views related to Ground I. SSA 165[6], 168.[7] And, two agencies, the Department of Transportation (DOT) and the Department of the Army, wrote to say they declined to offer any comment. SSA 163,[8] 164.[9] The Coalition for Responsible Siting of LNG Facilities submitted a letter commenting that "the safety, security and environmental concerns raised by this project cannot be overcome or mitigated." SSA 175.[10]

For the reasons set forth below, several of these items, recently-accepted into the Decision Record, bolster the arguments made in MCZM's opening brief as to why override is not appropriate here.

ARGUMENT

The Secretary may override a state's inconsistency finding on either of two grounds. Ground I requires the Secretary to find that the proposed activity is consistent with the objectives of the CZMA because the Applicant has shown that (1) the proposed activity furthers the national interest, (2) the furtherance of the national interest outweighs any adverse coastal effects and (3) there is no reasonable alternative. 16 U.S.C. § 1456(c)(3)(A); 15 C.F.R. § 930.121. Ground II requires the Secretary to find that the activity is "otherwise necessary in the interest of national security." 16 U.S.C. § 1456(c)(3)(A).

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[6] Letter of David R. Hill (DOE) to the Honorable John J. Sullivan (DOC), dated November 26, 2007. SSA 165.

[7] Letter of J. Mark Robinson (FERC) to Brett Grosko (NOAA), dated November 20, 2007. SSA 168.

[8] Letter of Stacey L. Gerard (DOT) to Joel La Bissonniere (NOAA), dated November 26, 2007. SSA 163.

[9] Letter of Michael G. Ensch (Department of the Army) to Ben [sic] Grosko (NOAA), dated November 20, 2007. SSA 164.

[10] Letter from Joe Carvalho (Coalition) to Brett Grosko (NOAA), dated December 1, 2007. SSA 175.

The items recently accepted in the Decision Record strengthen and confirm MCZM's arguments that neither ground has been satisfied and an override here would be inappropriate.

I. THE LOR, AFFIRMANCE, MASSDEP RULINGS, AND COMMENTS CONFIRM THAT THE APPLICANTS HAVE NOT DEMONSTRATED THAT THE PROJECT IS CONSISTENT WITH CZMA'S OBJECTIVES.

A. The LOR and Affirmance Confirm that the Project is Too Unsafe to Become Operational; and, Therefore, that the Applicants Have Not Demonstrated that the Project Furthers the National Interest in a Significant or Substantial Manner; And, the Comments Offer Nothing to Save them.

On October 24, 2007, the Coast Guard issued the LOR, which made official and final the negative suitability determination predicted by the Coast Guard's May 2007 Assessment (MCZM's Supplemental Appenix ("SA"), Tab 14). *See* SSA 1-39. Consistent with the Assessment, the LOR made the ultimate recommendation that the key stretch of the Taunton River is unsuitable from a navigation safety perspective for the proposed type, size, and frequency of LNG marine traffic. SSA 1-2. Thus, based on similarly comprehensive and detailed findings (*see* MCZM Br. at 6-7, 12-13, 26, 28 (discussing Assessment)), the LOR prohibits LNG tankers from transiting the Taunton River, as the Assessment suggested it would. SSA 1-2.

The upshot of the LOR is two-fold: First, as a practical matter, without tankers to deliver LNG to the proposed facility, the Project is ineffectual, unviable and simply cannot yield any of the goals or benefits touted by Applicants or commenters DOE and FERC (*e.g.*, increase in regional fuel supply and infrastructure diversity; and development of coastal resources, etc.). Second, as a regulatory matter, the Project that is the subject of this Secretarial review is dead: FERC's approval of the Project is conditioned on approval by the Coast Guard; and, this key

condition is unmet. Thus, the Project being reviewed lacks authorization to go forward. *See e.g.*, SA Tab 12, para. 14; *see also* Amicus Brief of Fall River at 9. A suggestion that the Secretary should overlook the practical and regulatory impotence of the Project and base his review on a fictional, functioning Project (WC Reply Br. at 4; MR Reply Br. at 4-5), has no basis in the reality of the CZMA scheme.

The only way to breathe life back into the Project would be if the LOR and Affirmance are reversed by the Coast Guard or a Court; but, unless and until that happens, and short of Applicants seeking to stay these proceedings until such events transpire, the Secretary must rule on the Record before him: *i.e.*, deciding whether the proposed Project, which now possesses no means of receiving fuel, could further national interest in a significant or substantial way, if at all, or be necessary for national security. *See* 15 C.F.R. § 930.130(d). Obviously, it cannot. Thus, for present purposes, that fact that appeals of the LOR and Affirmance are ongoing, does not lessen the force of the LOR.[11]

Further, in November 2007, Weaver's Cove requested reconsideration of the LOR (SSA 40), and on December 7, 2007, after a thorough review of the request, the Coast Guard Captain of the Port ("COTP") issued a letter finding "no substantive issue, nor new information, that would suggest [his] recommendation of unsuitability was incorrect or made without due consideration of the record." SSA 94. Rather, after reconsideration, the COTP "affirm[ed his] determinations, analysis, and ultimate recommendation that the waterway . . . is unsuitable." SSA 98. Thwarting Applicants' suggestion that he exercised flawed judgment by not rubber-

[11] Similarly, any plans Applicants may have to submit a new delivery proposal (or Letter of Intent) to the Coast Guard, do nothing to blunt the effect of the LOR and Affirmance for present purposes.

stamping the recommendation of marine pilots, the COTP incisively noted: "Ultimately, I am the only financially disinterested party with the statutory authority and responsibility in the LOR process for ensuring the safety of the federal waterway." SSA 98.

With the addition to the Decision Record of the LOR and the Affirmance, the Record now provides even stronger support for MCZM's arguments. *See* MCZM Br. at 12-14. In its opening brief, MCZM relied on the prediction of unsuitability in the Assessment to demonstrate the Project is untenably unsafe, and, therefore, could not possibly further national interests in a significant or substantial manner. *Id.* The Decision Record now includes two consistent, final, and unequivocal determinations, by the lead federal agency, that leave no doubt that the Project, as proposed, has been determined to be too unsafe to go forward.

To the extent that the potential benefits of the Project – offered by Applicants or commenters as support for furtherance of national interest – are predicated on facts or assumptions at odds with this Record (*i.e*., they assume a fictional, functioning LNG terminal), they must be viewed as highly speculative. Under the Secretary's precedent, the speculative nature of any potential benefit must be considered and reduces the contribution to furthering beneficial interests, if any. *See Consistency Appeal of Mobil Oil Exploration & Producing Southeast, Inc.*, at 40 (Sept. 2, 1994); MCZM Br. at 13.

Any attempt by Applicants' attorneys to argue that the Secretary should ignore the LOR and Affirmance[12] as decisions related to "vessel transit activities" that are outside the scope of the Project under MCZM's review (or the Secretary's review here) contradicts Applicants' actual

[12] Applicants' attorneys already made this flawed argument as to the Assessment. *See* WC Reply Br. at 1-3 (arguing that "vessel transit activities" are not under review in this appeal); MRP Reply Br. at 1-3 (same).

submittals to MCZM. *See e.g.*, Weaver's Cove Appendix ("WCA") 1, Cover letter, at Tab 1. Weaver's Cove's submittal states:

> Weaver's Cove . . . is proposing to construct a . . . [LNG] import terminal and vaporization facility in Fall River, MA. In support of the navigational requirements for the LNG Terminal, Weaver's Cove proposes to conduct . . . dredging . . . . This Federal Consistency Certification addresses both the construction of the LNG terminal and these dredging activities."

WCA at Tab 1, Cover letter at 1 (clarifying that the dredging activities that are part of the Project are proposed in "support of navigational requirements"). Likewise, in the "Project Description" section of its Federal Consistency Certification ("Certification") submittal, Weaver's Cove described the dredging portion of the Project as being "necessary to enable LNG tankers to access the LNG Terminal" (*id.*, Certification, at 3), further demonstrating that tanker transits are an essential component of the proposed Project. More pointedly, Weaver's Cove described to MCZM, in detail, how and why the Project evolved from initially proposing to use larger tankers to ultimately proposing to use smaller tankers for LNG deliveries. *Id.*, Certification, at 5.[13] Weaver's Cove also explained to MCZM its justification for not proposing any reduction in the dredging depth despite the switch to the smaller tanker proposal. *Id.*, Certification at 5-6 & n.8.

If current arguments by Weaver's Cove's attorneys[14] – that "vessel transit activities" are separate and apart from the Project that was being reviewed by MCZM – are true, then it is odd,

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[13] For example, Weaver's Cove explained that it "initially anticipated that LNG would be delivered to the Terminal by ships with a capacity of up to 145,000 m^3," making deliveries "every five to seven days" but how, in February 2006, it proposed "an alternative plan to use smaller LNG vessels" that it anticipated would make deliveries "every three days" due to "a provision of the Transportation Act of 2005 that may preclude the removal of the existing Brightman Street Bridge." *Id.*

[14] *See*, WC Reply Br. at 3; MRP Reply Br. at 3. In their reply briefs, Applicants quote *Consistency Appeal of Long Island Lighting Co.* (Feb. 26, 1988) ("*LILCO*"), at 10, to suggest that the Coast Guard's review of "vessel transit activities" is beyond the scope of MCZM's

indeed, for Weaver's Cove to have described the vessel transit plan, and changes to the vessel transit plan, in such vivid detail, as part of the "Project Description" submitted to MCZM. Rather, here, as the Certification demonstrates, "vessel transit" is what necessitates the dredging that is an integral part of the Project under review.

Finally, comments of DOE and FERC, related to Ground I, fail to add any Record support that would allow Applicants to satisfy their as yet unmet burden to show that the Project furthers national interest in a significant or substantial way. FERC does not even attempt to address the import of the LOR (*see* SSA 168-70), and DOE summarily dismisses it by stating that "navigational suitability does not itself present an adverse coastal effect as contemplated by the CZMA" (SSA 167). DOE's suggestion that the Secretary would only consider the LOR as an adverse coastal effect, or not at all, is simply hard to understand.

Thus, the LOR and Affirmance bolster MCZM's arguments that a Project this untenably unsafe cannot further national interests (MCZM Br. at 12-14), and the relevant Comments offer no support to salvage Applicants' converse position.

B. The LOR and MassDEP Deficiency Letters Confirm that Adverse Coastal Effects Remain Unknown; the Secretary Lacks Information Necessary to Conduct the Requisite Balancing, Even if Any National Interest was Furthered, Which it is Not; and, to Preserve the Integrity of the CZMA Scheme, the Secretary should not Override MCZM's Procedural Objections in These Circumstances.

On December 14, 2007, MassDEP issued five rulings in connection with pending Permit

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review. *Id.* However, *LILCO* is inapposite. *See*, MCZM Br., at 18, n.11. In *LILCO*, an overreaching state was seeking information on coastal effects from the operation of a power plant where an applicant sought consistency certification merely as to ongoing dredging and jetty maintenance activities that it had been performing for nearly 20 years. Here, the applicable regulations require consideration of the dimensions of the tankers and frequency of the transits to the extent that these characteristics inform how, and to what extent, proposed dredging activities may be approvable. *See* Part I.B., *infra.*

requests in association with the Project. MassDEP issued to Weaver's Cove a federal Clean Water Act §401 water quality certification for the backfilling of a proposed lateral pipeline under the Taunton River (SSA 100), and MassDEP also issued to Mill River Pipeline a state M.G.L. c. 91 license approving the installation of the lateral pipeline, both of which were issued subject to various conditions (SSA 108).

The other December 14, 2007, rulings identified deficiencies with respect to three separate requests: for a state M.G.L. c. 91 license for water dependent activities and structures associated with the proposed LNG terminal, including, among other things, a docking system for berthing LNG tankers ("Terminal Deficiency Letter") (SSA 158); for a state M.G.L. c. 91 permit for dredging of the channel and turning basin to accommodate LNG tankers to deliver LNG to the terminal and of a trench for the proposed lateral pipeline ("Dredge Permit Deficiency Letter") (SSA 153); and for a state water quality certification with respect to proposed dredging activities in the channel and turning basin and associated with the lateral pipeline trench ("WQC Deficiency Letter") (SSA 147).[15]

These three deficiency letters confirm and highlight MCZM's arguments that the impact to coastal resources simply cannot be known until missing information essential to make determinations on state Permits is identified, and, in turn, any Permit conditions are identified and imposed. *See* MCZM Br. at 14-17.

Here, the deficiencies arose because the LOR, in prohibiting the proposed tanker traffic invalidated key facts and assumptions that the applicable regulations require MassDEP to consider as part of its review. *See* SSA 147, 153, 158. For example, in the WQC Deficiency

[15] *See supra*, n.2.

Letter, MassDEP stated:

> Crafting a dredging-based water quality certification without a set of valid facts that delineate the scope of the project is infeasible and inconsistent with the underlying premise of the regulations. In this case, the dimensions of the tankers are the set of facts that delineate the scope of the project and, in light of the LOR, are unknown.

SSA 149. MassDEP therefore concluded that it lacked "fundamental valid information" necessary to approve dredging. SSA 150.

Similarly, in the Dredge Deficiency Letter, MassDEP noted that the LOR's conclusion – that the waterway is unsuitable from a navigation safety perspective for the proposed type, size, and frequency of LNG marine traffic – fundamentally invalidated the factual assumptions contained in the Permit requests, and, thereby, created "a critical information gap regarding the navigational requirements" of the Project. SSA 155.

The regulations provide that only the minimum amount of dredging to allow the proposed activities should be allowed. *See* 310 CMR 9.40(3)(a); MCZM Br. at 15. However, the LOR's rejection of the proposed ship dimensions and frequency of transits left MassDEP without any basis to determine what the minimum requirements should be, because key aspects of the Project that would inform those determinations were no longer defined.[16] As a consequence of the "critical information gap[s]" created by the LOR, "the necessary volume, footprint and timing of the proposed dredging activity cannot be reasonably assessed making it infeasible to apply the

[16] Dimensions are key to evaluating minimal navigational requirements because, for example, draft of a vessel bears upon the needed channel depth, turning radius of a vessel would affect the footprint needed, and frequency of transits would affect the needed channel depth where more dredging (i.e., deeper channel) would enlarge the tidal-window in which tankers could safely pass and, therefore, allow more frequent transits. Where dimensions and frequencies are unknown, it is impossible to evaluate minimum navigational requirements.

performance standards." SSA 155. Any decision in this void would be arbitrary or speculative. *See* SSA 154.

Finally, review of the Terminal deficiency Letter is also instructive. The applicable regulations provide that MassDEP may not issue a M.G.L. c. 91 license unless the project serves a proper public purpose which provides greater benefit than detriment to the rights of the public in said lands." 310 CMR 9.31(2). While projects are presumed to serve a proper public purpose under 310 CMR 9.31(2)(a), MassDEP found that the LOR rebutted that presumption "until such time as the USCG determines that the applicant's proposal constitutes a navigationally safe transit of the Taunton River." SSA 159. MassDEP also found that the LOR demonstrated that the Project would interfere with the public's rights to navigation, and that "[t]he clear discrepancies between the applicant's and USCG's assessment of the potential interference with navigation must be addressed by the applicant to demonstrate that in those areas outside the [designated port area] the project shall not significantly interfere with the public's rights of navigation (310 CMR 9.35(2)(a))." SSA 160.

Information gaps and and factual deficiencies prevented MassDEP from applying the regulatory performance standards. They also prevented MassDEP from evaluating what, if any, restrictions or conditions may be needed or appropriate to allow authorization of the proposed activities. It is the identification of such conditions that is essential to evaluate the impacts to coastal resources. Without such information, a full understanding of coastal effects simply cannot be known. *See* MCZM Br., at 15-17 (arguing that in the absence of state permits, adverse coastal effects remain unknown). Thus, MassDEP's deficiency letters add strong support for those arguments.

Contrary to Applicants' assertion (WC Reply Br. at 1; MR Reply Br. at 1), MCZM does not dispute that the CZMA allows Applicants to refuse to agree to an extension of the consistency review period and force the instant consistency appeals. Rather, MCZM makes two different points related to the pursuit of this approach by Applicants: The first point is that the CZMA scheme generally contemplates Secretarial review in circumstances where substantive state review of enforceable policies has already taken place. Where it has not, as is the case here, due to Applicants' actions, MCZM believes the course of action by the Secretary that would most capture the spirit and intent of the CZMA would be to refrain from overriding. Such an approach would preserve – and not bypass, as Applicants' approach does – the "cornerstone" role that state consistency review is intended to play in the CZMA scheme. *See* MCZM Br. at 2, *quoting* 71 Fed. Reg. 789/2 (Jan. 5, 2006) ("The CZMA federal consistency provision is a cornerstone of the CZMA program"). *See also* MCZM Br. 18-20.

The second point is that, as these deficiency letters confirm, missing information that precludes the state from properly evaluating applicable regulatory factors also will impair the Secretary's ability to conduct a proper, well-informed override review. *See* MCZM Br. at 17.

Under the LOR, LNG tankers are prohibited from the waterway. In these circumstances, no point would be served by allowing certain proposed dredging activities. In other words, even if, *arguendo*, the coastal effects and environmental impacts to aquatic resources from the proposed dredging activities were minimal, where there is no means of fuel delivery, and, therefore, no – or at best highly-speculative – benefits, even the minimal effects are not outweighed and cannot be justified or allowed.

Because the LOR, as upheld by the Affirmance, establishes conclusively that the Project cannot go forward, its relationship or relevance to the evaluation of adverse coastal effects becomes clear. The above discussion demonstrates that it was prudent, reasonable, and wise – and not mere recalcitrance or stonewalling – for MassDEP to stay its technical review until the Coast Guard issued the LOR. Applicants' suggestion that MassDEP's delay was unreasonable fails to appreciate the interrelationship between the processes, which, necessarily, feed facts and information to each other. Applicants' suggestion is also at odds with views expressed by FERC[17] and the United States Court of Appeals for the First Circuit.[18]

Just as the LOR informed MassDEP's subsequent rulings on the pending dredging applications, the ramifications of the LOR must be considered in the Secretary's review.

C. The LOR and MassDEP Rulings Confirm that it was Not Possible or Appropriate for MCZM to Consider Whether Reasonable Alternatives Exist, Other Than Through Its Substantive Consistency Review Process, Which Has Never Occurred.

The LOR makes clear that the project cannot go forward as proposed. It is impossible to identify alternatives to a purely fictional Project.

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[17] FERC would likely have no problem with MassDEP's stay of technical review to await the USCG's LOR. WCE's attorneys submitted comments to FERC seeking clarification "that an agency presented with an authorization request must not be permitted to await the outcome of another agency's action prior to commencing its own review." 71 Fed. Reg. 62915/2, n.21 (Oct. 27, 2006). In response, FERC stated that "[w]hile such an approach might be viewed as contrary to EPAct 2005's expressed intent to expedite the review process for proposed gas projects, provided the agency in waiting is able to meet its deadline to reach a final decision . . . there would not necessarily be cause to seek to compel the recalcitrant agency to commence its review sooner." Id. Thus, FERC interprets the EPAct of 2005 and its own regulations as not precluding an agency from awaiting another agency's action if in so doing it still meets its lawful deadlines, as MassDEP did.

[18] In *Fall River v. FERC*, 507 F.3d 1 (1st Cir. 2007), the First Circuit put off review of an appeal of FERC's conditional approval of the Project as being unripe when it concluded, based on the Coast Guard's May 2007 Assessment – the Court was not yet aware of the LOR, which had just been issued days before – that "the project may well never go forward."

The MassDEP Rulings also confirm the impossibility of determining whether reasonable alternatives exist given the fundamental deficiencies in information identified by the three deficiency letters. Because MassDEP did not have the requisite facts (*i.e*. what dredging the navigational requirements of the Project are), it could not issue permits. *See* SSA 147, 153, 158; *see* also *supra*, n.2. Until these factual deficiencies are corrected, neither MCZM nor the Secretary can properly evaluate whether there are reasonable alternatives, because there is nothing against which to compare an alternative.

II. THE LOR, AFFIRMANCE, AND COMMENTS CONFIRM THAT THE APPLICANTS HAVE NOT DEMONSTRATED THAT THE PROJECT IS NECESSARY IN THE INTEREST OF NATIONAL SECURITY; AND, IN FACT, THESE ITEMS STRENGTHEN MCZM'S ARGUMENT THAT THE PROJECT WOULD ACTUALLY IMPAIR NATIONAL SECURITY.

On October 24, 2007, the Secretary solicited comments from various federal agencies in relation to these consistency appeals. For most of the agencies, the Secretary only requested comments on Ground II (*i.e*., whether, if the Project does not go forward, a national defense or other national security interest would be significantly impaired). *See*, http://www.ogc.doc.gov/czma.htm.

Only two of the Comments received by the Secretary addressed Ground II, and both made negative findings. SSA 162, 171. The Department of Defense (DOD) stated that it is "not aware of any national defense or other national security interest that would be significantly impaired if the project is not permitted to go forward as proposed." SSA 162. In addition, Congressmen Barney Frank and James P. McGovern jointly commented that not only is Ground II unmet, but that the "inverse is true." SSA 171. The Congressmen relied upon the Coast Guard's determination that "there is no safe way of delivering the LNG" to the site to conclude:

"An LNG facility that the Coast Guard has determined cannot safely receive LNG traffic, cannot by its very nature provide a positive national security interest." *Id*.

DOD's negative finding on Ground II should be given "considerable weight." 15 C.F.R. §930.122. None of the other federal agencies that responded addressed Ground II, and two agencies, DOT and the Department of the Army (Army Corps of Engineers) declined to offer any comment. *See* SSA 163, 164.

Thus, the Comments provide strong support for MCZM's argument (*see* MCZM Br. at 25-30) that Applicants have failed to show any impairment to national security due to the fact that the Project will not go forward.

The LOR and Affirmance also provide further substantial support for MCZM's argument (*see* MCZM Br. at 25-30). *See* SSA 1-39; 94-99. Moreover, these documents confirm MCZM's conclusion that if the Project went forward in its current form, it would actually impair national security. MCZM Br. at 25-20. *See also* SSA 171 (Congressmen finding same). A Project that involves so much risk, to so many people, cannot possibly be necessary in the interest of national security. *See* MCZM Br. 13, 28.

CONCLUSION

For the foregoing reasons, the Secretary should decline to override MCZM's objections.

Respectfully submitted,

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I hereby certify that on March 14, 2008, I served the foregoing Supplemental Brief for Respondent and Second Supplemental Appendix by first-class mail, postage prepaid, and sent courtesy copies by email to the following:

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